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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.W., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. N.W. et al., Defendants and Appellants.	D043436 (Super. Ct. No. SJ10919)

APPEALS from a judgment of the Superior Court of San Diego County, Peter E. Riddle, Judge. Affirmed.

N.W. (Mother) and Michael W. separately appeal a judgment terminating their parental rights to their son, J.W., under Welfare and Institutions Code section 366.26. (All statutory references are to the Welfare and Institutions Code.) Mother asserts the

court abused its discretion when it summarily denied her section 388 modification petition. Each parent challenges the sufficiency of the evidence terminating parental rights because each asserts he or she has a beneficial relationship with J.W. within the meaning of section 366.26, subdivision (c)(1)(A). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2002, the San Diego County Health and Human Services Agency (the Agency) removed four-month-old J.W. from his parents' custody and filed a section 300 petition on his behalf. The petition alleged J.W. suffered serious physical harm because he had multiple bone fractures and bruising to his eye orbits. He was declared a dependent in May 2002. Services were initially denied to both parents, but following a successful California Rules of Court, rule 39.1B writ petition, Mother received six months of services. In March 2003, she gave birth to another child in Texas which she left with Michael's mother, presumably to avoid removal of that child from her custody. Mother's services to reunify with J.W. were terminated in June 2003 because she had made no progress in understanding the severity of J.W.'s injuries or providing an explanation for them.

In November 2003, Mother filed a section 388 modification petition seeking J.W.'s return to her custody, services, and to vacate the section 366.26 hearing. She asserted her circumstances had changed because Michael had left the home, she had community support, she had consistently visited, and she had demonstrated significant progress in

therapy. She asserted it would be in J.W.'s best interests to be returned to her care because she was his biological mother and could provide him with a safe home.

At the December 2003 hearing, the court summarily denied Mother's section 388 modification petition. Contemporaneously, the court held the section 366.26 hearing, found J.W. was adoptable and that none of the section 366.26, subdivision (c)(1) exceptions applied, and terminated parental rights.

DISCUSSION

I

Mother contends the court erred in denying her section 388 petition without a hearing because she demonstrated a prima facie showing of changed circumstances and J.W.'s best interests would be served by vacating the referral order. We review the summary denial of a section 388 petition for an abuse of discretion. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.)

Under section 388, a party may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence; and (2) the proposed change in the court's previous order is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) The petition must be liberally construed in favor of granting a hearing to consider the parent's request. (Cal. Rules of Court, rule 1432(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) If the liberally construed allegations of the petition do not show changed circumstances or new

evidence that the child's best interests will be promoted by the proposed change of order, the court need not order a hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.)

Mother's services were terminated because she did not understand the severity of J.W.'s injuries and had not admitted Michael had injured the child. She had been told by the social worker that to reunify with J.W., she had to admit Michael seriously injured the child. (In our decision on Mother's writ petition, we stated: "[T]he weight of the evidence indicates that [Michael] was the perpetrator." (*N.W. v. Superior Court* (Aug. 13, 2002, D040102) [nonpub. opn.] p. 10.).) Thus, to establish a prima facie case of changed circumstances, she had to assert she understood Michael injured J.W. However, the record shows that since services were terminated, Mother continued to deny Michael was responsible. She did not assert in her petition that she accepted he injured the child. Her claim that Michael left the home does not demonstrate she believes he was responsible for J.W.'s injuries, only that she understood the Agency would not return J.W. to her if she and Michael were living together. In any event, her claim that she had separated from Michael is questionable. She did not want to separate from him. As of September, she was wearing a ring on the ring finger of her left hand, which was presumably a wedding ring. The social worker saw her with Michael in October, several months after the separation was supposed to have occurred. Mother also saw nothing

wrong with Michael having contact with their other child, from which we infer she did not believe he was responsible for J.W.'s injuries. If she believed he broke nine of J.W.'s bones, it is unlikely she would allow him to have contact with their other child. Because she did not acknowledge Michael injured J.W., she did not establish a prima facie case of changed circumstances, regardless of her other allegations.

Even if Mother sufficiently made a prima facie showing of changed circumstances, her allegations of best interests were insufficient to warrant a hearing. She alleged J.W.'s best interests were served by being with his biological parent. However, preservation of family ties is important only at the time the court removes the child from parental custody. (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) Once the court terminates reunification services, family preservation ceases to be an overriding concern. (*Ibid.*) This is because "the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

Further, to make a prima facie showing of best interests, Mother had to allege she has eliminated the factors that led to J.W.'s placement outside of the home. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463-464.) As stated above, Mother did not allege she had accepted that Michael caused J.W.'s injuries. Without such a statement, she has not alleged she has eliminated the factors that led to the dependency. Mother's assertion of best interests is insufficient to warrant a hearing and to delay J.W.'s placement in a permanent home.

Even assuming the court should have held a hearing on Mother's section 388 modification petition, the order denying a hearing did not prejudice Mother and is not reversible error. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) As discussed, Mother would not have gained the relief she sought even had a full hearing occurred because she had not alleged, and therefore did not intend to prove, that she had accepted Michael had seriously injured J.W. Regardless of any other alleged accomplishments, she had to prove she had accepted his role to succeed on her petition. Because she did not intend to do so, any error in denying her a hearing on her petition is harmless.

II

Each parent contends there is insufficient evidence to support the court's finding the section 366.26, subdivision (c)(1)(A) exception did not apply to his or her relationship with J.W. We review the court's finding that the section 366.26, subdivision (c)(1)(A) exception does not apply under the substantial evidence standard of review. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) The court must determine by clear and convincing evidence whether a minor is adoptable. (§ 366.26, subd. (c)(1).) If the court finds a minor is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the minor under one of the specified exceptions. (*Ibid.*) The parent has the burden to show termination would be detrimental to the minor under one of those

exceptions. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) The section 366.26, subdivision (c)(1)(A) exception to the adoption preference applies if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Here, because the court found each parent regularly visited J.W., we examine the record to determine if substantial evidence supports the court's conclusion that each did not have a beneficial relationship with him. We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . . If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To meet the burden of proof for this statutory exception, the parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The social worker acknowledged J.W. enjoyed visits with Mother. However, pleasant visits are not sufficient (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827);

Mother must show the harm to J.W. from terminating parental rights would outweigh the benefits he would gain from adoption (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575).

The social worker did not believe terminating Mother's parental rights would deprive J.W. of a substantial positive emotional attachment. He saw Mother as an extended family member and did not prefer to be with her instead of anyone else. He separated easily from her after visits, did not look to her for comfort, safety, or security, and could not rely on her for his safety, security, or day-to-day nurturing. Further, Mother did not understand the severity of J.W.'s injuries and continued to deny Michael could have caused the injuries. She did not understand J.W.'s developmental and emotional needs and placed her own issues and feelings ahead of his.

The social worker believed that J.W. viewed Michael as a playmate, not a parent. Although they had fun during the visits, the relationship was not beneficial and J.W. would not be deprived of a substantial positive emotional attachment if parental rights were terminated. The benefits J.W. would gain from being adopted far outweighed any benefit he might receive from maintaining a legal relationship with either parent. Neither parent introduced any contrary expert evidence.

Further, J.W. did not view either parent in a parental role. He had lived with them for only four of his 23 months. During some visits, he showed no reaction when they arrived and did not react to their attempts to play with him or give him affection. He was not upset when visits ended. Substantial evidence supports the finding that the section 366.26, subdivision (c)(1)(A) exception does not apply.

DISPOSITION

The judgment is affirmed.

McINTYRE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.